

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

\*\*\*\*\*

<b>IN THE MATTER OF APPLICATION FOR</b>	)	
<b>BENEFICIAL WATER USE PERMIT NO. 41H</b>	)	
<b>30023457 BY UTILITY SOLUTIONS, LLC</b>	)	<b>FINAL ORDER</b>

\*\*\*\*\*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307, a hearing was held beginning on November 14, 2007, in Bozeman, Montana, to determine whether a beneficial water use permit should be issued to Utility Solutions, LLC, hereinafter referred to as "Applicant" for the above application under the criteria set forth in Mont. Code Ann. §85-2-311.

**APPEARANCES**

Applicant appeared at the hearing by and through counsel, Matt Williams and Don MacIntyre. Marty Gagnon, P.E., Morrison-Maierle, Inc.; Richard Stenzel, P.E., Applegate Group, Inc.; Michael Kaczmarek, Morrison-Maierle, Inc.; Mr. Dave Pruitt; and Ms. Barbara Campbell, part owner of Utility Solutions, LLC, testified for the Applicant. Barbara Campbell, provided rebuttal testimony for the Applicant.

Objector Roselee Faust, Objectors Paul Shennum and Sandra McManus, and Objector Montana River Action Network [hereafter Objector Group] appeared at the hearing by and through counsel, Hertha Lund. Lee Rozaklis, Hydrosphere Resource Consultants, Inc.; Roselee Faust; Paul Shennum; and Joe Gutkoski, President, Montana River Action Network, testified for the Objector Group. Objector Group also called Ms. Susan Swimley, Esq.; Scott Compton, Regional Manager, Bozeman Water Resources Regional Office; and Russell Levens, Department Staff Expert, to testify.

Objector Montana Trout Unlimited, appeared by and through counsel Laura Zeimer.

Objector Francis and Deloris Kelly, Walt Sales, and Association of Gallatin Agricultural Irrigators [hereafter AGAI] appeared by and through counsel David Weaver.

## **EXHIBITS**

Both Applicant and Objectors offered exhibits for the record. The exhibits are admitted into the record to the extent noted below. Except when evidentiary objections are sustained, prefiled exhibits (filed with prefiled direct testimony) will be part of the record.

Applicant offered nineteen exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibits A1-A13 (submitted in pre-filed testimony), and A14-A19 (submitted at hearing).

**Applicant's Exhibit A1** is a six-page copy (consisting of Sheets 1-6, each 11" x 17") of the Final Plat of Galactic Park Subdivision prepared by Morrison-Maierle, Inc. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A2** is a two-page copy of "Information and data to prove the proposed use is a beneficial use of water and the flow rate and volume requested is reasonable." (Gagnon Pre-filed testimony)

**Applicant's Exhibit A3** consists of an 11"x17" map entitled Utility Solutions, LLC Water and Sewer Utilities. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A4** is a two-page document entitled "Household Consumption." (Gagnon Pre-filed testimony)

**Applicant's Exhibit A5** is a one-page document entitled "Summary of Consumptive Use Under Permit Application No. 41H-30023457." (Gagnon Pre-filed testimony)

**Applicant's Exhibit A6** consists of an 11"x17" map entitled Utility Solutions, LLC Public Water Supply System. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A7** consists of an 11"x17" map entitled Utility Solutions, LLC Public Wastewater System. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A8** consists of an 11"x17" map entitled Utility Solutions, LLC Service Area. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A9** is a four-page document from Montana Department of Environmental Quality to Chris Wasia, Morrison-Maierle, Inc. containing a copy of the "Certificate of Subdivision Plat Approval," dated July 12, 2005. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A10** is a two-page document from Montana Department of Environmental Quality to Martin Gagnon, Morrison-Maierle, Inc. regarding EQ 04-2805, Utilities Solutions Public Drinking Water System, Four Corners, Gallatin County, Montana, dated January 6, 2005. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A11** is a five-page document from Montana Department of Environmental Quality to Martin Gagnon, Morrison-Maierle, Inc. regarding EQ 04-2595, Utilities Solutions Public Wastewater Treatment System, Gallatin County, Montana, dated November 23, 2004. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A12** is a twenty-five page copy of a letter to Barbara Campbell, Utility Solutions, LLC, from Montana Department of Environmental Quality dated June 8, 2005. (Gagnon Pre-filed testimony)

**Applicant's Exhibit A13** is a twenty-nine page copy entitled Water Supply and Wastewater Treatment Service Agreement, dated May 24, 2005. (Gagnon Pre-filed testimony)

The following exhibits were introduced by Applicant at hearing:

**Applicant's Exhibit A3** consists of an 11"x17" map entitled Utility Solutions, LLC Water and Sewer Utilities. (duplicate)

**Applicant's Exhibit A14** is a one-page copy of a General Abstract for Roselee and Russell Faust, dated June 7, 2007.

**Applicant's Exhibit A15** is a one-page copy of a General Abstract for Roselee and Russell Faust, dated November 13, 2007.

**Applicant's Exhibit A16** is a one-page copy of a General Abstract for Paul Shennum and Sandra Shennum, dated November 13, 2007.

**Applicant's Exhibit A17** is an eleven-page document entitled "Transient effects of groundwater pumping and surface-water-irrigation returns on streamflow." Kendy, E., and J.D. Bredehoeft (2006). Transient effects of groundwater pumping and surface-water-irrigation returns on streamflow. Water Resour. Res. 42. W08415, doi: 10.1029/2005WR004792. This exhibit was offered according to the Montana Rules of Evidence No. 803. Argument was heard from both sides and the Hearing Examiner then took the objection under advisement. Objection to Exhibit A17 is **OVERRULED**, and is admitted. The opinions in this document are opinions of experts who are recognized as experts by and/or were previously used as a witness by members of the Objector Group.

**Applicant's Exhibit A18** is a two-page document entitled "Gallatin River."

**Applicant's Exhibit A19** is an oversized map entitled "Utility Solutions, LLC Water and Wastewater Flow Measurement", dated August, 2007.

Objector Group offered eleven exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector Group's Exhibits OA - OE (submitted in pre-filed testimony), and O1, O2, O4, O5, and O6 (submitted at hearing). Exhibit O3 was not admitted.

**Objector's Exhibit OA** is an eleven-page copy of Lee T. Rozaklis Curriculum Vitae (Rozaklis Pre-filed testimony)

**Objector's Exhibit OB** is a one-page document entitled "Exhibit B: Summary of Water Requirements for Galactic Park Subdivision." (Rozaklis Pre-filed testimony)

**Objector's Exhibit OC** is a one-page document entitled "Exhibit C: Net Accretions/Depletions from Proposed Uses under 41H-30023457." (Rozaklis Pre-filed testimony)

**Objector's Exhibit OD** is a two-page document entitled "Exhibit D: Accretions/Depletions from Utility Solutions' Proposal Under 41H-30023457, Including Augmentation and Changes of Water Rights as Previously Authorized in Application No. 41H-30014080" (page one) and "Net Accretions/Depletions of US Proposal Including Augmentation and Changes of Water Rights as Authorized" (page two). (Rozaklis Pre-filed testimony)

**Objector's Exhibit OE** is a one-page document entitled "Exhibit E: Major Assumptions in Historical Irrigation Use Water Budget Analysis" (Rozaklis Pre-filed testimony)

The following exhibits were introduced by Objectors' at hearing:

**Objector's Exhibit O1** is an 11"x17" map entitled "Proposed Four Corners Neighborhood Planning Jurisdiction," prepared by Gallatin County, MT, GIS Department and Planning Department, 2007, and admitted for demonstrative purposes only.

**Objector's Exhibit O2** is a thirty-nine page "work copy" of Application for Beneficial Water Use Permit No. 30023457-41H.

**Objector's Exhibit O4** is an 8 ½ "x11" map entitled "Four Corners Plan Area (1/31/2006)."

**Objector's Exhibit O5** is a three-page copy of a document pertaining to Municipal Use, dated June 29, 2005.

**Objector's Exhibit O6** is a four-page document regarding Comments on Proposal for Ground Water and Surface Water Monitoring Near Zoot Enterprises, 31, October 2003 by Matt Webb and Steve Custer

### **PRELIMINARY MATTERS**

Objector Montana Department of Fish, Wildlife and Parks (MDFWP) did not appear at hearing. The night before the hearing the Hearing Examiner received Objector MDFWP's "Notice of Nonparticipation In Hearing" filed by and through counsel Bill Schenk. Therein, Objector MDFWP states that the only reason it objected to this Application is to ensure that the

settlement agreement with the Applicant in the previous application for this purpose remained intact through this proceeding. To that end this Objector and Applicant have agreed in principle to either amend the existing settlement agreement or enter a new settlement agreement under which Objector MDFWP would not oppose this pending Application and Applicant would mitigate the potential affects of its proposed ground water pumping by perfecting its change of use to the extent of the consumptive use associated with this Application. Objector DFWP further states that it is confident that DNRC will accurately determine the consumption associated with this Application, and that Applicant will ultimately mitigate the adverse effect associated with that consumption by either not diverting surface water from the West Gallatin River or diverting surface water and supplementing the ground water supply through use of its existing infiltration gallery. The Hearing Examiner provided copies at hearing to counsel for Applicant and Objector Group.

At the opening of the hearing Objector Francis and Deloris Kelly, Walt Sales, and AGAI, by and through counsel David Weaver, made two motions, and following the rulings on the motions, joined in Objector MDFWP's Notice of Nonparticipation and departed from the hearing.

Objectors' first motion moved the Hearing Examiner to take judicial notice of the findings of fact, conclusions of law, and order (inclusive of the Settlement Agreement and the Notice of Consent to Administrative Order) in Application No. 41H 30012025. Applicant responded that the Examiner must take such notice; Objector Montana Trout Unlimited joined in the motion, and Objector Group responded that such notice must include reference that the Final Order in that matter has been appealed to district court and is still pending a decision. Counsel modified the motion to acknowledge that the matter for which notice is requested is pending appeal in district court. The motion was GRANTED including acknowledgement of the appeal.

Objectors' second motion was a resubmission of the prehearing motion to limit issues jointly filed by Objectors Francis and Deloris Kelly, Walt Sales, and AGAI; Montana Department of Fish, Wildlife and Parks; and Montana Trout Unlimited that was deemed untimely and denied. Applicant responded that the motion must be denied; Objector Montana Trout Unlimited responded that the motion was only to limit issues for hearing and not to disturb the ruling on the motion for Summary Determination; Objector Group responded that the hearing now being held should go forward without any issue preclusion. The resubmitted Motion to Limit Issues At Hearing was DENIED by the Hearing Examiner.

Following the rulings on Objector Francis and Deloris Kelly, Walt Sales, and AGAI's two motions, Objector Montana Trout Unlimited joined in Objector MDFWP's Notice of Nonparticipation and departed from the hearing.

Immediately prior to the close of the hearing Applicant moved the Hearing Examiner to default Objectors Clinton Cain, Judith Cain, and Sandra McManus for failure to appear at the hearing. Hertha Lund, counsel for Objector Sandra McManus, responded that Ms. McManus appeared through counsel and the motion should be denied. A default occurs when a party fails to appear at a hearing. Upon default, the defaulting party's claim or interest in the proceeding may be dismissed. See Admin. R. M. 36.12.36.12.208. The motion was **DENIED** with respect to Objector McManus, and **GRANTED** with respect to Objectors Clinton and Judith Cain. Objectors Clinton and Judith Cain are **DISMISSED** and are no longer parties in this matter.

The record was left open following the hearing for filing of simultaneous briefs by the Parties on the issue of whether the rules found in Admin. R. M. 36.12.120 affected by the passage of HB 831 by the 2007 Legislature (specifically 36.12.120(6) and (7)) apply to this Application, and written closing statements. The record was left open for receipt of briefs filed by postmark on or before November 26, 2007. Briefs were received from the Applicant, the Objector Group, and a joint memorandum from Objector AGAI, Objector Montana Trout Unlimited, and Objector MDFWP.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

### **FINDINGS OF FACT**

#### **General**

1. Application for Beneficial Water Use Permit 41H 30023457 in the name of Utility Solutions, LLC, and signed by Barbara Campbell, was filed with the Department on August 2, 2006. (Department file)
2. A public notice describing facts pertinent to this application was published in the *Bozeman Daily Chronicle*, a newspaper of general circulation on November 2, 2006, and was mailed to persons listed in the Department file on November 1, 2006. (Department file)
3. The Environmental Assessment (EA) prepared by the Department for these applications, dated August 9, 2006, was reviewed and is included in the record of this proceeding. In the EA at Part I, No. 2, on Page 6 of 7, secondary and cumulative impacts on the physical environment

and human population have been addressed. Therein it states: “secondary impacts to the physical environment, or human population have not been identified. It appears that this source of water may be hydraulically connected to the West Gallatin River. The cumulative impact of additional wells could impact water users on the river, unless potential water loss is mitigated. The cumulative impact on the human population will be an increase in people living in the Four Corners area.” Part I, No. 3, on Page 6 of 7, states: “The applicant has filing [sic] a change application to remove ground from irrigation, and augment the loss of water to the West Gallatin River. The applicant has water rights that are to be used to mitigate potential loss of water from the West Gallatin River.” (Department file)

4. This Application replaces the non-cooling purpose portion of application No. 41H 11546900 originally filed by Zoot Properties, LLC. (Hereafter, “Zoot1”) (Department file)

5. The day following the hearing in this matter the Hearing Examiner began preparing the portions of the Draft Final Order that are not dependent upon the post-hearing briefs. While using the Department file copy of the Public Notice received November 3, 2006, by the Bozeman Regional Office, to summarize the Application I noticed that the Place of Use land description had a handwritten modification on it. The range number in the place of use land description, (5E) had the “5” crossed out and a “4” was handwritten next to the crossed out “5”. I then checked the Public Notice attached to the Affidavit & Certification of Public Notice received from the Bozeman Daily Chronicle. The attached public notice states the place of use is in Range 5E.

The application form (Form 600), No. 41H 30023457, submitted to the Department lists the place of use in Range 5E. The map submitted with the Application and the maps presented as Applicant’s exhibits at hearing clearly show the place of use in Range 4E. The Hearing Examiner looked at the Final Order in Zoot1, and found the place of use (which is supposed to be the same place of use as in this matter), to be located in Range 4 East. The correct place of use is in Range 4 East, not Range 5 East.

The Department has found in earlier applications and orders that an application may be amended after public notice if amendments would not prejudice anyone. To cause prejudice, the amendment must suggest an increase in the burden on the source. See In the Matter of Application No. 40J-111302 (P), by USA (DOI / BLM), 2001; In the Matter of Application No. 77814-76H, by Thomas Pierce, 1996. Here, the application was originally noticed showing the place of use 6 miles east of where it really is. The points of diversion were noticed in the correct range number. The map of the place of use in the Application file was correct. No party raised this issue at hearing. The ground water point of diversion would in this Hearing Examiner’s mind

be the critical location for determining adverse affect to an existing water right. Anyone interested in the source and point of diversion could have reviewed the Department's file in this matter with the correct place of use indicated on the map submitted with the Application. I find that there was no prejudice to potential objectors on the specific facts of this case. (Department file)

6. Applicant seeks to appropriate 300 gallons per minute (gpm) up to 142.09 acre-feet of ground water per year. The ground water is to be diverted from one or more of three wells located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , all in Section 11, Township 02 South, Range 04 East, Gallatin County, Montana. The proposed use is municipal use. The proposed place of use is located in the N $\frac{1}{2}$ SW $\frac{1}{4}$  and the S $\frac{1}{2}$ NW $\frac{1}{4}$  of Section 11 all in Township 2 South, Range 4 East, all in Gallatin County, Montana. The proposed water system will incorporate a 750,000 gallon water storage reservoir located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 11, Township 2 South, Range 4 East, Gallatin County, Montana. The proposed period of diversion and period of use is January 1 through December 31, inclusive, of each year. (Department file)

7. The Hearing Examiner hereby takes official notice of the findings of fact, conclusions of law, and order (inclusive of the Settlement Agreement and the Notice of Consent to Administrative Order) In the Matter of Application for Beneficial Water Use Permit Nos. 41H 30012025 and 30013629 (2006). No Party contested the materials so noticed at hearing. Mont. Admin. R. 36.12.221.

### **Physical Availability**

8. The three production wells in the Application are each intended to provide water for the municipal purpose. Well PSW-1 was test pumped at a constant 425 gpm on December 2, 2001, for 24 hours. Well PSW-2 was test pumped at a constant 425 gpm on December 2, 2001, for 24 hours. Well PSW-3 was test pumped at a constant 500 gpm beginning on September 10, 2002, for 72 hours. Applicant's consultant, Pat Eller, used aquifer characteristics determined from the aquifer testing reported by Mike Kaczmarek in his August 13, 2004, memorandum (Application Appendix I) to model pumping water levels (using the proposed pumping scheme) throughout a year. The Department file contains Mr. Eller's findings that the predicted drawdown pumping three wells peaks at 15.68 feet in PSW2 after 265 days of pumping (July 30), and the amount of submergence over the pump while running all three wells is 10.32 in well PSW2. The pumping



water levels remain above the pumps during this period as modeled. Water is physically available for the three production wells. (Department file, testimony of Mike Kaczmarek)

### **Legal Availability**

9. Applicant has provided an analysis of the evidence on physical water availability and has not identified the current existing legal demands on the source of supply throughout the area of potential impact by the proposed use. Current existing legal demands on the ground water source **and** current legal demands on the West Gallatin River outside the irrigation season have not been identified. A comparison of the physical water supply at the proposed points of diversion with the existing legal demands on the supply of water at the time of the previous Galactic Park subdivision application will not show that all current existing demands can be met. Applicant's expert formed an opinion regarding the area of potential impact from the proposed pumping by this Application and Applicant's previous applications, however, I see no information regarding other water rights<sup>1</sup> which have been issued within the potential area of impact since that time, **or** regarding surface water users who may be impacted other than those who filed objections. Applicant's expert used a conservative application of the aquifer hydrologic constants and prevailing gradient to estimate that 8,748 acre-feet per year is available in the Quaternary alluvial aquifer, not including the Tertiary aquifer, in the area including the Applicant's wells in the earlier application. Applicant's expert then estimated the legal demands within that area to be 2,795.22 acre-feet per year, including the water requested under the previous Application Nos. 41H 30012025, 41H 30013629, and 41H 30019215. Mr. Kaczmarek added the volume for this Application (142.09 acre-feet) to the previous legal demand after the three previous Applications listed above (2795.22 acre-feet), to bring the total annual proposed diversion to 2937.31 acre-feet per year. Mr. Kaczmarek estimates this volume to be 34 percent of the annual flow of ground water through the area. However, I found no review of the Department's records for the source of supply throughout the area of potential impact which includes water rights issued since the previous Utilities Solutions, LLC, applications. Both Mont. Code Ann. §85-2-311(1)(a)(ii)(B) and (C), and Admin. R. M. 36.12.1704 require "identification of existing legal demands" for each application. Even assuming *arguendo* that the existing legal

---

<sup>1</sup> See Order Denying Motion For Summary Determination, June 22, 2007 (The Hearing Examiner contacted Mr. Scott Compton, Manager, DNRC Bozeman Water Resources Regional Office, on June 21, 2007, to see if his office had issued any Certificates of Water Right for exempt ground water wells in the Four Corners area after the Zoot hearing. Mr. Compton responded that they have issued at least seven Certificates to Utility Solutions in this area, and there are probably others. It is possible that the previous determination that the criteria under Mont. Code Ann. § 85-2-311 for the Zoot application have been met is outdated. [emphasis added])

demands required in the statute or rule are not necessary to show water is legally available, the record does not explain how an opinion that water is legally available can be rendered without knowing the legal demands based on the Department records and other evidence provided to the Department within the area of potential impact. In Zoot1 the source of supply throughout the area of potential impact was interpreted to be the cone of depression caused by pumping the ground water wells<sup>2</sup> as guided by the Department's definition of immediate or direct connection of ground water to surface water. Here, the source of supply throughout the area of potential impact is extended to include the area impacted by prestream capture of ground water and the area impacted by depletions to the West Gallatin River. The larger area of potential impact here distinguishes this Application from Zoot1. The Applicant has not determined the current existing legal demands throughout the area of potential impact for this Application, and it is not known from the record that the amount of water physically available exceeds the existing legal demands within the area of potential impact. (Department file, testimony of Mike Kaczmarek)

### **Adverse Effect**

10. Applicant's plan for the exercise of the proposed permit that demonstrates that the Applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied is to follow the augmentation plan approved in Utility Solutions, LLC's, Application No. 41H 30014080 (2006). That augmentation plan is what was previously proposed by the Applicant (and approved) to mitigate the effects of withdrawals from the "Zoot Wells" and specifies: (A) 0.17 cfs up to 51.8 acre-feet per year out of Water Right No. 41H 126910-00 and 0.06 cfs up to 18.2 acre-feet per year out of Water Right No. 41H 126909-00, a total of 0.23 cfs up to 70 acre-feet, shall not hereafter be diverted from the West Gallatin River, and shall otherwise be left in the West Gallatin River, to augment any depletions to West Gallatin River flows arising out of or related to the exercise of any rights issued for the use of water in or the same as those found in Beneficial Water Use Permit No. 41H 11546900<sup>3</sup>; (B) Augmentation use would occur from May 1 to September 30, inclusive; (C) The augmentation purpose for this 0.23 cfs up to 70 acre-feet per year of augmentation water shall be from the location of the Beck and Border Ditch to a point where the West Gallatin River leaves the North side of Sections 10 and

---

<sup>2</sup> Zoot1 Finding of Fact No. 8 in part: "The existing legal demands (identified by the DNRC for the cone of depression at the request of the Applicant) in the area are located where the drawdown in the cone of depression ranges from 0.4 to 0.1 feet or less."

<sup>3</sup> The approved plan, if used, must be modified to substitute this application number, 41H 30023457 for that of the previous application for this same purpose, No. 41H 115469-00.

11, Township 2 South, Range 4 East, Gallatin County, Montana. (Department file [Application No. 41H 30014080 by Utility Solutions, Proposal for Decision, Finding of Fact No. 6, adopted by Final Order (2006)])

11. Applicant equates the amount of water consumed by the proposed purpose to the depletion to the ground water aquifer and eventually the West Gallatin River. Here, consumption is the amount of water removed from the hydrologic basin due to evaporation, evapotranspiration, or removal of water with sludge from the wastewater treatment plant, i.e., the difference between the water pumped and the water that is subsequently returned to the aquifer after water has been delivered to meet the proposed use. Applicant's experts estimate the amount of water consumed by the Applicant's proposed use (apart from those losses associated with the irrigation of lawns and gardens) would be no more than 2% of the amount pumped for the non-irrigation purpose (87.84 acre-feet), 1.76 acre-feet, and 100% of the amount pumped for lawn and garden purposes, 54.25 acre-feet, for a total of 56.01 acre-feet. Objector Group's expert estimates consumption by the proposed uses at 56.03 acre-feet, but arrives at that estimate by assuming a 3% (not 2%) consumption rate on 59.25 acre-feet (not 87.84 acre-feet) for non irrigation purposes. Applicant's expert bases his opinion on the fact that no industrial users with high depletions are going to be served and no cooling tower water that is based on evaporative cooling is being proposed, and domestic uses may use the amount of water Montana Department of Environmental Quality (MDEQ) requires the wastewater system be designed to treat. Objector Group's expert bases his estimate on occupancy rates for the same purposes Applicant used to make its estimate using MDEQ's design requirements. The estimated amount consumed by the Applicant's requested amount is reasonable at 56.01 acre-feet. (Testimony of Richard Stenzel, Marty Gagnon, Lee Rozaklis)

12. Applicant used average values of aquifer properties determined from aquifer tests to calculate daily values of drawdown associated with the pumping rates and pumping schedules for one year of operation of the proposed appropriation. The existing wells in the area are located where the calculated drawdown ranges from 0.4 to 0.1 feet or less. Therefore, the proposed appropriation will not cause enough drawdown at the locations of the existing wells known at the time of the original application (Zoot1) to affect their ability to reasonably exercise their ground water rights. The affect to wells now in the Department records is not in the record. (Department file)

13. Applicant plans to treat domestic wastewater and return that water to the aquifer and thereby mitigate the effects of withdrawing the non-consumed portion of the requested appropriation on potentially affected water rights in the West Gallatin River. Such year-round treatment will not mitigate the effects of that water which is consumed on a year-round basis. The amount of consumed water is small (Applicant estimate = 1.76 acre-feet; Objector Group estimate = 1.78 acre-feet), but will nonetheless deplete the West Gallatin River by a like amount. Objectors MDFWP, Objector Montana Trout Unlimited, and Objector Francis and Deloris Kelly, Walt Sales, and AGAI all seem to agree that this Applicant will mitigate depletions in the West Gallatin River either by not diverting an existing irrigation surface water right or by supplementing the ground water supply through use of its existing infiltration gallery. In the previous application for this purpose (Zoot1) this Hearing Examiner found:

or the amount of non-irrigation season capture must be augmented if there are affects on existing rights during this time. Off season rights which might be affected are the Montana Department of Fish, Wildlife and Parks' (DFWP) instream Murphy Rights downstream of the Zoot area, and their instream Water Reservations. DFWP's instream rights will be adversely affected if the flow in the river is diminished below their instream right, or their rights are met less frequently. DFWP has not seen or compared the historic use of Applicant's water rights with the proposed use. However, if Applicant's planned reduction in use of the irrigation rights is greater than the amount consumed, and the rights not used are not used by someone else, then DFWP is not concerned. DFWP's concern is with the proposed irrigation consumption. The adverse effects of capture of the ground water tributary to the West Gallatin River is limited to effects during the irrigation season. Applicant's augmentation plan to not use the two irrigation rights will offset the impacts of capture during the irrigation season.

See Zoot1, Finding of Fact No. 13. The existing demands within the area of potential impact in the Zoot1 proceeding were limited by the Department's definition of immediately or directly connected to surface water. Thus, only adverse effects to ground water users found to be in the area of potential impact were considered, and only adverse effects to surface water users who filed objections were considered by the Hearing Examiner in that proceeding. See Zoot1, Finding of Fact No. 8. Some of those filing objections in Zoot1 which are parties here (not Objector Group), ultimately agreed to the irrigation season mitigation (augmentation) plan and any effects on appropriators with non-irrigation season rights were not considered. Here, the Department's concerns about "Reduction from winter depletions will not be augmented." (See Department file, January 17, 2007, Application File Review) have gone un-noticed. The analysis in Zoot1 was limited because it only focused on rights immediately or directly connected to surface water (i.e., within the cone of depression) or those surface water rights brought out in

Objector witness testimony. Applicant's plan cannot be considered complete until all prior water rights on the source of supply throughout the area of potential impact are identified.

(Department file, testimony of Marty Gagnon, Michael Kaczmarek, Lee Rozaklis)

### **Adequacy of Appropriation Works**

14. The proposed means of diversion is through three production wells constructed to public water supply standards. The pump control system will cycle between the individual wells. The water system will maintain pressure through the use of a storage reservoir. The production wells are designed to provide fire flows in addition to the requested flow. The appropriation works for production purposes are adequate to divert the modeled volume and flow rate. (Department file, testimony of Marty Gagnon)

15. Diversion from the wells is measured at the well, into the storage tank, out of the storage tank, and at the delivery point to each individual user. If applicable, irrigation use and indoor domestic use are combined and measured by the same meter. (Testimony of Marty Gagnon)

16. The design, construction, and operation of this system is regulated by the Montana MDEQ, and the design of the system is necessarily predicated on MDEQ design standards produced to regulate the design of public water and sewer facilities. MDEQ has reviewed and approved this public water system and public wastewater system and the design is based on engineering standards commonly employed by engineers in designing and constructing such systems. (Department file, testimony of Marty Gagnon).

### **Beneficial Use**

17. Applicant has provided persuasive evidence that the proposed use is a beneficial use of water. Applicant intends to supply water within the identified place of use for municipal uses including: (1) domestic water requirements of a subdivision; (2) fire suppression and fire fighting for the structures located in or near the place of use; (3) commercial purposes within the place of use, and (4) lawn and garden irrigation within the subdivision. Applicant has an agreement to provide bulk water to the Four Corners Water and Sewer District for this subdivision for these uses. The proposed use will benefit the homeowners who purchase homes within the Subdivision, other commercial patrons, and the public, as the system includes a fire-suppression component. The proposed use is a municipal use and beneficial use of water. (Department file, testimony of Marty Gagnon)

18. Galactic Park Subdivision is located within 1.25 – 4.5 miles of the eastern boundary of the Bozeman City Limits and wholly within the unincorporated town of Four Corners

encompassing 14.98 square miles (See Exhibit O4: Gallatin County Planning Department Four Corners Plan Area, 1//31/06 map). The United States Census Bureau classifies Four Corners as a Census Designated Place (CDP). CDP's are densely settled concentrations of population not within an incorporated town, but locally identified by a name. The U.S. Census Bureau, Census 2000, reports Four Corners having a population of 1828 and 795 housing units. The Four Corners area within the Gallatin County Four Corners Plan Area includes 2 gas stations, 3 churches, 2 schools, and approximately 30 businesses. Businesses include a hotel, restaurants/saloon, fitness center/day spa and retail stores. The Four Corners Area fits within the parameters of an unincorporated town and the Galactic Park Subdivision is in and around the unincorporated town of Four Corners. (Department file)

19. The size of the water and wastewater system and the estimate of the amount of water needed for the proposed uses within the subdivision are based on standards from MDEQ Circulars (design standards used by MDEQ to regulate the design of public water and sewer facilities). The Galactic Park Subdivision will have 42 residential lots, 120 condominium units, minor commercial use, and require a total of 87.84 acre-feet of water per year (excluding 54.25 acre-feet requested for irrigation). Estimates do not include water for fire suppression. Water demands were based on the uses within the Subdivision's boundaries as estimated by Applicant's engineer using MDEQ Circulars and assumptions generally used by the engineering community. Objector Group's expert opines that the most reasonable estimate of the annual volumetric water requirement for the intended uses set forth in this Application is approximately 120 acre-feet per year (this includes residential and commercial plus irrigation and distribution system losses – this compares to a total request of 142.09 acre-feet by the applicant ( $87.84 + 54.25 = 142.09$ ); the objectors estimate for uses without irrigation is 59.25 acre-feet). Objector Group's expert believes Applicant has overestimated the per capita water use factors by using the MDEQ guidelines for estimating wastewater flows instead of considering occupancy rates and evidence from studies of actual domestic use rates in its calculations. While Objector Group's expert did estimate a lower amount of water could serve the proposed purposes based upon occupancy rates, he did not show that the amount of water requested by the Applicant was incorrectly estimated or is a waste of water. The volume of water requested is the amount necessary for the proposed purpose. (Department file, testimony of Marty Gagnon, Lee Rozaklis)

### **Possessory Interest**

20. Applicant has the possessory interest or the written consent of one with possessory interest in the property where the water will be put to beneficial use. Applicant will have consent prior to supplying water to a landowner, because Applicant will not supply water to any landowner without the landowner subscribing to the service, which is by its nature, consent. Applicant has possessory interest in the proposed place of use. (Department file, testimony of Marty Gagnon)

### **Water Quality Issues**

21. Four objections relative to water quality were filed against this application. No objections were filed relative to water classification or to the ability of a discharge permit holder to satisfy effluent limitations of his permit. Objector Shennum and Objector Montana River Action Network argue that the Applicant's capacity to process the effluent from their collective developments is insufficient and the injected wastewater will exceed the nitrate concentration limit of 10mg/l affecting water quality of other water users. In addition Objector Montana River Action Network argues there will be a serious dewatering of the West Gallatin River by this and the other applications filed by this Applicant which cause thermal pollution. Objector Faust argues that the proposed use will draw down the aquifer and river, and affect water quality due to lower flows. Objector Cain filed the fourth water quality objection; however, this Objector has been dismissed from this proceeding. and his water quality objection need not be addressed. Applicant's water quality analysis has been confirmed by MDEQ in their approval of Applicant's wastewater treatment process including the design of its wastewater treatment plant, method and location of disposal, and disposal of the treated effluent from the wastewater treatment plant. MDEQ reviewed and approved numerical and computer ground water modeling to ensure that the ground water and surface water quality outside the mixing zone will not be affected by discharge permit. Applicant plans to mitigate depletions in the West Gallatin River caused by withdrawals from their wells by calling the augmentation water (change of purpose approved in Application No. 41H 30014080) to the historic headgate and then not diverting the water from the West Gallatin River so serious dewatering and thermal pollution in the river will not occur. Objector Shennum and Objector MRAN presented no evidence that supports their argument that Applicant's capacity to process the effluent from this development is insufficient and the disposed wastewater will adversely affect the water quality of a prior appropriator. Objector MRAN has no water rights and presented no evidence to support their argument that there will be a serious dewatering of the West Gallatin River by this and the other Applications filed by this

Applicant which cause thermal pollution. Objector Faust presented no evidence to support her argument that the proposed use will draw down the aquifer and river and affect water quality due to lower flows. (Department file, testimony of Rosie Faust, Joe Gutkoski, Paul Shennum, Marty Gagnon)

### **Basin Closure Issues**

22. DNRC cannot process or grant an application for a permit to appropriate water within the Upper Missouri River basin until the final decrees have been issued in accordance with Mont. Code Ann. Title 85, Chapter 2, Part 2 for all of the subbasins of the Upper Missouri River basin. The “Upper Missouri River basin” means the drainage area of the Missouri River and its tributaries above Morony Dam. Mont. Code Ann. §85-2-342(4). The proposed wells are located in the Gallatin Valley which is within the Upper Missouri River basin closure area. However, there are exceptions to this closure for applications for permits to appropriate water for domestic, municipal, or stock use. Mont. Code Ann. §85-2-343(2)(c) and §85-2-342. This Application is for municipal use. (Department file, testimony of Marty Gagnon)

23. Applicant admits that it is not a municipality. The proposed use, however, is a high density domestic use, lawn and garden irrigation, commercial use, and fire suppression which are of the type normally considered to be municipal use. DNRC made a determination on June 15, 2007, (Memorandum to File from Terri McLaughlin, Water Rights Bureau Chief, June 15, 2007) that this application is for a permit to appropriate water for a municipal use, which allowed processing of these Applications to continue. After reviewing the evidence in the record, I agree with the Department’s determination in that Memorandum and hereby incorporate that Memorandum as part of this decision. DNRC has a history of issuing permits for municipal use to applicants who are not municipalities, cities, or towns; however such applicants must meet the Department’s interpretation of Admin. R. M. 36.12.101(39) which defines “municipal use.” Objector Group disagrees that this Applicant meets the definition of a municipal use and that the proposed use is an exception to the basin closure statutes. (Department file, testimony of Barbara Campbell, Marty Gagnon)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:



## **CONCLUSIONS OF LAW**

### **General**

1. Objector Group and Applicant each filed Prehearing Memorandums and a post-hearing closing statement and brief requested by the Hearing Examiner on “whether the requirement of (pre House Bill 831) Admin. R. M. 36.12.120(6) & (7) apply to this Application. Objector Francis and Deloris Kelly, Walt Sales, and AGAI; Objector Montana Trout Unlimited; and Objector MDFWP filed a joint post-hearing brief as requested by the Hearing Examiner above.

Applicant argues that the factual and legal issues that arise under Mont. Code Ann. §85-2-311 remain the same for the previous “Zoot I” proceeding and this Application, DNRC should reexamine the application of collateral estoppel principles as set forth in Utility Solutions’ Motion for Summary Determination to this proceeding, the fact that DNRC approved this use subject to the approved augmentation in Application No. 41H 30014080, the amount of water requested is reasonable when based upon the MDEQ’s standards, nothing in this proceeding has anything to do with the effects of the change of water right already approved by DNRC, MDFWP is a senior appropriator for water rights for instream flow and they are fully content to have the applicant augment depletions as provided in the approved change Application No. 41H 30014080 instead of when the depletions occur, and if DNRC now sees a substantive distinction between this use and that previously approved as “Zoot I” the DNRC should simply condition this application on augmentation that fully offsets all depletions to the West Gallatin River that will arise from this use. Applicant argues that the proposed use is municipal within the meaning of Mont. Code Ann. § 85-2-343(2)(c) (2005) and Admin. R. M. 36.12.101(39). Applicant argues that Admin. R. M. 36.12.120(6) does not apply to this application. Applicant also questions the standing of certain parties as valid objectors. However, in this particular case, the Hearing Examiner was not delegated the authority to review the Department’s determination of standing of objectors and cannot rule on that issue. See Hearing Notice and Appointment of Hearing Examiner, June 22, 2007.

Objector Group argues two issues of law: 1) Is the Applicant entitled to a municipal use exception from the Basin Closure Law? and 2) Augmentation plans (to mitigate depletions to surface water) were not authorized by the Legislature prior to 2007 and then argues that the Applicant has not met its burden in proving the statutory criteria under Mont. Code Ann. § 85-2-311, and that DNRC should have included a cumulative impact analysis in its environmental

assessment that analyzes all prior Utility Solutions, LLC, projects along with this Application. Objector Group also argues that the requirements of (pre House Bill 831) Admin. R. M. 36.12.120(6), (7), (8), and (9) apply to this Application and do not allow this Applicant's augmentation plan.

2. **Relevance of Admin. R. M. 36.12.120(6), (7).** Applicant argues this rule has no application to the instant application, as this application is not dependent upon augmentation for compliance with the basin closure provisions codified at Mont. Code Ann. § 85-2-342. Objector Group argues that Utility Solutions, LLC, must configure its augmentation plan to meet the Department administrative rules. Objector AGAI, Objector Montana Trout Unlimited, and Objector MDFWP have no concerns regarding this rule based upon the findings of their expert in an earlier application.

This Hearing Examiner sees that the underlying issue in this question is whether the Applicant is required by rule to augment (mitigate) depletions during the season of depletion. These administrative rules historically serve the purpose of conveying to new appropriators and others what is required to have an application considered correct and complete, not what is necessary in order to grant an application. These rules also do not provide for "augmentation" out of a basin closure. Thus, in the case at hand the Application was deemed correct and complete, with an augmentation plan which mitigates depletions only during the irrigation season. Here, the Hearing Examiner's inquiry is not to whether the Application was correct and complete, but whether the criteria for issuance of a permit are met or not. Therefore, the fact that Applicant's augmentation plan does not augment during the entire season of depletion in and of itself is not a reason to not process (reject or deny) the Application.

3. **Is Applicant entitled to a municipal use exception from the Basin Closure Law?** Objector Group argues that the Department should not process or grant Applicant a permit for municipal use based on Montana Trout Unlimited v. Montana Department of Natural Resources, 2006 MT \_\_\_, 331 Mont. 483, 133 P.3d. 224 [hereinafter TU]. Objector Group's reliance on TU is misplaced. TU dealt with the "ground water" exception to the upper Missouri River basin closure MCA §85-2-343 (2005) not the "municipal use" exception. That case did not address and had no holding on the interpretation of "municipal use" exception. As part of TU, the Department agreed to document in the application file its determination at the time of acceptance of an application that an application met one of the basin closure exceptions. The Department did this in this case as indicated by the June 15, 2007 Memorandum to the file by Terri McLaughlin.

Objector Group next argues that the Department is arbitrarily interpreting the reinstated rule defining “municipal use” because the Department is not limiting this “municipal use” application to municipalities. The reinstated rule, A.R.M. 36.12.101(39), states: “Municipal use’ means water appropriated by and provided for those in and around a municipality or an unincorporated town.” In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Mont. Code Ann. § 1-2-101. Like a statute, the Department must interpret the rule as a whole and give effect to each word. E.g., TU, ¶ 23 (give effect to all words, neither omit what has been inserted or insert what has been omitted). The reinstated rule clearly states “ in and around . . . an unincorporated town,” not simply “in and around a municipality.” The Department cannot ignore the second half of the definition. As indicated in the June 15, 2007 Memorandum from Terri McLaughlin, the Department reviewed the Montana case law interpreting “unincorporated town” and found that applying this case law in interpreting the application of the rule to the specific facts of this application, the Applicant qualified for municipal use. E.g., Pollard v. Montana Liquor Control Board (1942), 114 Mont. 44, 131 P.2d 974. The Objector Group presented no evidence, authority, or argument contrary to this interpretation other than to argue that only the term “municipality” should be used to interpret the rule. However, the Court in Lohmeier v. DNRC, Cause No. ADV-206-454, First Judicial District Court, Lewis And Clark County, *Decision and Order* (March 26, 2007), on appeal to Supreme Court, reinstated the full rule, not just that portion relating to “municipality.”<sup>4</sup> The Court examined the various statutes, including the basin closure exceptions (Mont. Code Ann. §85-2-343), and ruled that the full rule must be reinstated. Id. Given the reinstatement of the full rule by the Court in Lohmeier, the Objector Group’s contention that language of the rule is not consistent with the intent of the statute (Mont. Code Ann. §85-2-343) must be disregarded. Ignoring the “unincorporated town” language would be arbitrary and incorrect on the part of the Department in applying the rule.

Objector Group argues that the Census Designated Places (CDP) information provided by Applicant has no legal relevance because a CDC does not have a legal status as a

---

<sup>4</sup> The Objector Group also argues that the upper Missouri River basin closure exceptions at issue, Mont. Code Ann. 85-2-343(2)(c), do not mention “town” or “unincorporated town,” in support for their argument that the Department should not now consider those terms. However, it was Objectors Faust and Sandy McManus who along with James Lohmeier sought reinstatement of the full rule A.R.M. 36.12.101(39) in Lohmeier v. DNRC, Cause No. ADV-206-454, *supra*. These parties now appear to argue that the reinstated rule is wrong (Objector Group Post-Hearing Brief pp. 6-8) and then alternatively that the Department should not have repealed the definition (Objector Group Post-Hearing Brief p. 9).

municipality or unincorporated town. However, the CDP provides evidence of those population and development elements that are important in determining whether an unincorporated town exists pursuant to Montana law. While the designation as a “CDP” alone may be insufficient to determine whether an unincorporated town exists, the information presented in that designation is very important to the designation. I have reviewed the Department’s determination in the June 15, 2007 Memorandum from Terri McLaughlin to the file in this case, and after review of the record I agree with that determination. The Department also has a long history of granting “municipal use” permits to entities other than municipalities such as Mountain Water Company which provides the municipal water supply for the city of Missoula. See discussion of “municipal use” in *In the Matter of Application No. 41H 30012025 by Utility Solutions, LLC* (June 2006, pending order on petition for judicial review). Contrary to Objector Group’s contention, the June 15, 2007 Memorandum represents an interpretation of the reinstated rule applied to the specific facts of the particular applications addressed in the Memorandum and not a rule of general applicability.

DNRC cannot process or grant an application for a permit to appropriate water within the Upper Missouri River basin until the final decrees have been issued in accordance with Mont. Code Ann. Title 85, Chapter 2, Part 2 (2005) for all of the subbasins of the Upper Missouri River basin. The “Upper Missouri River basin” means the drainage area of the Missouri River and its tributaries above Morony Dam. Mont. Code Ann. §85-2-342(4) (2005). However, applications for beneficial water use permits to appropriate water for domestic, municipal, or stock use, i.e., exceptions to the closure, can be processed prior to issuance of final decrees for all the subbasins of the Upper Missouri River basin.<sup>5</sup> See Mont. Code Ann. §§85-2-342, 343(2)(c). The proposed use is a municipal use. See Finding of Fact No. 17, 18, 22, 23.

DNRC’s determination that these applications are for municipal use allows processing of the beneficial water use permit applications because the Applicant is a person, who may appropriate water for a beneficial use. Mont. Code Ann. §§§ 85-2-102(14); 85-2-301; 85-2-342, 343 (2005).

---

<sup>5</sup> In this particular case, the Hearing Examiner has the implied authority to determine whether the proposed use by the Applicant is an exception to the basin closure statutes. Mont. Code Ann. § 85-2-343(1) does not allow the Department to “process or grant” an application for permit. Mont. Code Ann. § 85-2-343(1)(2005)(emphasis added). Although it is implied, it is inherent that the Hearing Examiner has authority to decide whether an exception to the basin closure statutes exists or not because the Hearing Examiner is delegated the authority to determine whether a permit will be “granted.” In addition, the Hearing Examiner must determine whether the proposed use is a beneficial use. As part of that determination, the Hearing Examiner must determine whether the proposed use qualifies for the beneficial use requested.

4. **Augmentation plans (to mitigate depletions to surface water) were not authorized by the Legislature prior to 2007.** Applicant's plan to demonstrate that exercise of this permit will be controlled so the water right of prior appropriators will be satisfied was approved in the earlier applications by this Department.<sup>6</sup> I see nothing in the record in this matter that suggests augmentation was not authorized by the Legislature. There is simply no indication in the sections of the Montana Water Use Act that govern the water right permit process (Mont. Code Ann. §§ 85-2-311) that a "plan" of augmentation, either by replacement of water in a source of supply through a change in use of an existing water right or by other means, is prohibited as a way to preclude adverse affect from exercising a water right. Montana case law also provides a history of augmentation, including augmentation by new or untried methods. See Thompson v. Harvey (1974), 154 Mont. 133, 519 P.2d 963; Perkins v. Kramer (1966), 148 Mont. 355, 423 P.2d 587; see e.g., In the Matter of Application for Beneficial Water Use Permit No. 41H-104667(P) by Ronald J. Woods (June 1, 2000) and In the Matter of Application to Change Appropriation Water Right No. 41H-125497 by Ronald J. Woods (June 1, 2000) ([t]o ensure the pond is nonconsumptive, intake and outflow conveyances must be lined or conveyed by pipe. Evaporation must be replaced by some reduction in other uses. Here the water would be replaced by water made available through the change of another water right.); In the Matter of Application for Beneficial Water Use Permit No. 76H-85273 by Mark McBride (2001)(permit for ground water in a controlled ground water area issued on condition of augmentation of surface water source). Augmentation is also recognized in other prior appropriation states for various purposes. E.g. C.R.S.A. § 37-92-302 (Colorado); A.R.S. § 45-561 (Arizona); RCWA 90.46.100 (Washington); ID ST § 42-1763B and § 42-4201A (Idaho); see Colorado Policy 2003-2, Implementation of Section 37-92-308 C.R.S. (2003) Regarding Substitute Water Supply Plans (recognizing in part history of common usage of substitute water supply plans prior to 2002 for water use out-of-priority); see also Lawrence J. MacDonnell, *Out-Of-Priority Water Use: Adding Flexibility To The Water Appropriation System*, 83 Neb. L. Rev. 485, 539-540 (2004)(recognizing the use of augmentation plans). Objectors presented no authority for their proposition that augmentation is not allowed for the purpose of meeting the Mont. Code Ann. § 85-2-311 criteria. Mont. Code Ann. § 85-2-311(1)(b).

---

<sup>6</sup> The Objector Group cites to the Clark Fork Basin closure in support, the criterion under Mont. Code Ann. §85-2-337 that applicant prove that the augmentation plan provides sufficient augmentation water in amount, time, and location to replace depletions to senior water rights, is expressly in addition to the criteria of §85-2-311 (including adverse effect).

Applicant has an existing change of water right approval (Application No. 41H 30014080) that it proposes shows existing appropriations will be satisfied if this permit is authorized. The Department Order in Application No. 41H 30014080 is currently pending judicial review. See Finding of Fact No. 10 above. Objector Group seeks to argue whether augmentation is a beneficial use of water under Montana law. However, that is not an issue for this case but was an issue in the proceeding for Application No. 41H 30014080.

**5. Should the DNRC have included a cumulative impact analysis into its environmental assessment as required by MEPA (Montana Environmental Policy Act) that analyzes all prior Utility Solutions, LLC, projects along with this Application?**

Applicant's objection that this line of questioning of witness Barbara Campbell is outside the scope of this Hearing Examiner's jurisdiction in this proceeding was sustained.

The Department file contains an environmental assessment which addresses cumulative impacts, in the absence of the Applicant's proposed augmentation plan to mitigate impacts. The adequacy of the Department EA is an issue outside the scope of this Hearing Examiner's authority. The issues for which he was appointed are whether the appropriation for which the Applicant has applied meets the required statutory criteria of Mont. Code Ann. §85-2-311. See Mont. Admin. R. 36.12.204(1)(e), June 22, 2007, Notice of Hearing and Appointment of Hearing Examiner, and Finding of Fact No. 3.

6. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 by a preponderance of the evidence. Mont. Code Ann. §85-2-311(1). A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested, based on an **analysis** of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected based on a consideration of an applicant's **plan** for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; the applicant has a

possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §85-2-311 (1) (a) through (h).

7. A public notice containing the facts pertinent to the permit application must be published once in a newspaper of general circulation in the area of the source and mailed to certain individuals and entities. Proper notice has been made. Mont. Code Ann. §85-2-307. See Finding of Fact No. 2.

8. The Hearing Examiner may take notice of judicially cognizable or generally recognized technical or scientific facts within the Department's specialized knowledge. Parties shall be notified either before or during the hearing or by reference in the proposal for decision of the material noticed. Here, Parties were notified during the hearing and no objection was made. ARM 36.12.221(4); ARM 36.12.229. See Finding of Fact No. 7.

#### **Physical Availability**

9. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont. Code Ann. §85-2-311(1)(a)(i). See Finding of Fact Nos. 8.

#### **Legal Availability**

10. The Applicant has not proven that water can reasonably be considered legally available in the amount and during the period of requested appropriation. Here Applicant repeatedly uses the same legal availability analysis as was used for Application No. 41H 11546900 and Applicant's other applications that followed. While the Department agrees with the Applicant that the Department's own determinations should have evidentiary import, e.g., Wills v. Morris (1915), 100 Mont. 514, 50 P.2d 862, the passage of time between Zoot1 and this application make that import problematic. On October 11, 2006, Mr. Jan Mack in a memorandum to Application for Beneficial Water Use Permit # 30023457, quotes "'Rule 36.12.1704(2) The applicant must identify the existing legal demands on the source of supply and those waters to which it is tributary and which the applicant determines may be affected by the proposed appropriation.' They have not done this." On October 19, 2006, Mr. Scott Compton notified the Applicant that "Administrative Rule 36.12.1704 has not been fully complied with . . ." On

January 17, 2007, Jan Mack documented in an “Application File Review” that “An index of water rights was not provided. Legal demands on the source of supply throughout the area of potential impact were not identified.” In a prehearing order this Hearing Examiner stated: “The Hearing Examiner contacted Mr. Scott Compton, Manager, DNRC Bozeman Water Resources Regional Office, on June 21, 2007, to see if his office had issued any Certificates of Water Right for exempt ground water wells in the Four Corners area after the Zoot hearing. Mr. Compton responded that they have issued at least seven Certificates to Utility Solutions in this area, and there are probably others. It is possible that the previous determination that the criteria under Mont. Code Ann. § 85-2-311 for the Zoot application have been met is outdated.” See Order Denying Motion For Summary Determination, June 22, 2007. This Hearing Examiner understands that it would take a lot of 10 acre-foot wells which are exceptions to the permit process, see Mont. Code Ann. §85-2-306(3), to increase the legal demands from 2937.31 acre-feet per year to the 8,748 acre-feet per year available. However, the statute requires Applicant to provide a comparison of “existing legal demands on the source of supply throughout the area of potential impact” with water shown to be physically available to assure there is water in the source for those with a right to demand water. See Finding of Fact No. 9 above. The statute requires an applicant to prove water is legally available based on the records of the Department or other evidence provided to the Department. The statute requires an applicant to identify water physically available, to identify existing legal demands on the source throughout the area of potential impact, and analyze this evidence including a comparison of existing demands with water physically available. I cannot assume what the record does not show. It is up to the Applicant per statute to supply the required analysis and not for the Department or Hearing Examiner to piece it together like a puzzle from the application, prior orders, or judicial notice of the Department records. I do not know what the existing demands are on ground water or surface water (that may fall outside the purview of Zoot1) throughout the area of potential impact at the time this Application was submitted. Existing demands have not been updated to include applications other than this Applicant’s water use permits, and the area of potential impact has not been updated. Mont. Code Ann. §85-2-311(1)(a)(ii). See Finding of Fact No. 9.

### **Adverse Effect**

11. The Applicant has not proven that the water rights of prior (ground or surface water) appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected when conditioned to assure Applicant’s plan accomplishes its goals. Applicant’s plan does not identify or show that prior appropriations, if any, outside the irrigation



season will be satisfied by that augmentation plan approved in Utility Solutions, LLC's, Application No. 41H 30014080. That augmentation plan is what was previously approved to mitigate the effects of withdrawals from the "Zoot Wells" on identified existing legal demands throughout the area of potential impact and on the water rights of objectors who objected to the Zoot1 application. Applicant argues in its Post Hearing Memorandum that "this Examiner already found and determined, wintertime depletions will be so minimal that they are inconsequential." This Application is distinguished from Zoot1 because in Zoot1 the area of potential impact was incorrectly limited by the Department's definition of "immediate and direct" for the ground water exception to the upper Missouri River basin closure Mont. Code Ann. §§85-2-342 and -343. Here, the area of potential impact is not limited to ground water within the cone of depression of the pumping wells as it was in Zoot1, and can be seen to include the surface water rights beginning on the West Gallatin River and downstream where the depletion occurs. The Department noted in its January 17, 2007 *Application File Review* that "Water will be depleted from the West Gallatin River. Reduction from winter depletions will not be augmented." Applicant did not provide evidence that water rights of other prior appropriators, other than those who filed objections, will be satisfied when winter depletions are not mitigated. The Zoot1 analysis on this issue was incorrect because it failed to analyze all surface water rights throughout the area of potential impact which might be adversely affected in the non-irrigation season when no mitigation (augmentation) was proposed. Applicant's plan augments (mitigates) depletions only in the irrigation season. There was no analysis of the effects of the non-irrigation season depletions to existing water rights which now could be within the potential area of impact. The augmentation plan does not augment depletions in the winter and without any analysis of the existing water rights, the Department cannot determine that there are no adverse effects to existing rights to ground water users or to surface water users outside the proposed augmentation period (May 1 to Sept. 30). Mont. Admin. R. 36.12.101 & 120. Mont. Code Ann. §85-2-311(1)(b). See Finding of Fact Nos. 10, 11, 12, 13.

### **Adequacy of Appropriation Works**

12. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. §85-2-311(1)(c). See Finding of Fact Nos. 14, 15, 16.

### **Beneficial Use**

13. The Applicant has proven the proposed use of water is a beneficial use of water for which Applicant can establish a water right under a permit. Applicant's flow rate and volume are supported by the requirements of MDEQ for a public water supply. The flow rate and volume of water requested is the amount needed to sustain the proposed purpose. Objector Group voiced a concern that excess water allowed for domestic uses (i.e. because Objector Group's expert believes 100 gallons per day [gpd] per capita is not needed) might go to other more consumptive uses throughout the Utility Solutions, LLC, service area that is served by the same wells. Here, I see that concern as an enforcement issue rather than a permitting issue. The Applicant's requested amount of water has been found to be a beneficial amount. Applicant measures the amount pumped from the wells and the amount used by the individual users. If more is being pumped than is being used, the Department may investigate according to its complaint procedure. Mont. Code Ann. §85-2-311(1)(d). See Finding of Fact Nos. 17, 18, 19, ; Conclusion of Law No. 3 above.

### **Possessory Interest**

14. The Applicant has proven a possessory interest in the property where water is to be put to beneficial use. Applicant has met the requirements of Mont. Admin. R. 36.12.1802(1)(b) because the proposal is for municipal use. Mont. Code Ann. §85-2-311(1)(e). See Finding of Fact No. 20.

### **Water Quality Issues**

15. The Applicant has proven that the water quality of a prior appropriator will not be adversely affected. Objections were raised as to the issue of water quality of a prior appropriator being adversely affected. Objector Clinton and Judith Cain have been dismissed from this proceeding and their water quality objection need not be addressed. Applicant Mont. Code Ann. §85-2-311(1)(f), (g), (h). See Finding of Fact No. 21.

### **General**

16. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. Applicant has not met the criteria for issuance of a permit when conditions are applied. Mont. Code Ann. §85-2-312. See Conclusions of Law Nos. 10, 11 above.

**WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

**ORDER**

Application for Beneficial Water Use Permit 41H 30023457 by Utility Solutions, LLC is  
**DENIED.**

**NOTICE**

This final order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 28<sup>th</sup> day of December 2007.

/ Original Signed By Charles F Brasen /

Charles F Brasen  
Hearings Officer  
Water Resources Division  
Department of Natural Resources  
and Conservation  
PO Box 201601  
Helena, Montana 59620-1601

## CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 28<sup>th</sup> day of December 2007 by first-class United States mail.

MATTHEW WILLIAMS - ATTORNEY  
WILLIAMS & JENT  
506 E. BABCOCK  
BOZEMAN MT 59715

DONALD MACINTYRE - ATTORNEY  
ATTORNEY AT LAW  
307 N JACKSON ST  
HELENA, MT 59601-5009

DAVID L WEAVER - ATTORNEY  
1700 W KOCH STE 4  
BOZEMAN, MT 59715

LAURA ZIEMER - ATTORNEY  
321 E MAIN ST STE 411  
BOZEMAN, MT 59715

BILL SCHENK - ATTORNEY  
MT DEPT OF FISH WILDLIFE & PARKS  
PO BOX 200701  
HELENA, MT 59620-0701

HERTHA LUND - ATTORNEY  
ART WITTICH – ATTORNEY  
WITTICH LAW FIRM  
602 FERGUSON AVE, SUITE 5  
BOZEMAN, MT 59718

**Cc:**  
DNRC, BOZEMAN REGIONAL OFFICE  
2273 BOOT HILL CT STE 110  
BOZEMAN, MT 59715

RUSSELL LEVENS – **Hand Delivered**  
PO BOX 201601  
HELENA, MT 59620-1601

CLINTON & JUDITH CAIN  
2551 MAGENTA RD  
BOZEMAN, MT 59718

/ Original Signed By Jamie Price /

Jamie Price  
Hearings Unit, 406-444-6615